

**Taxation and Revenue Department  
P. O. Box 630  
Santa Fe, NM 87504-0630**

**REGULATIONS PERTAINING TO THE  
WITHHOLDING TAX ACT  
SECTIONS 7-3-1 TO 7-3-13 NMSA 1978  
[3.3.2 NMAC]**

Revised January 2011

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3.3.2 NMAC**

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**7-3-1. SHORT TITLE.--Chapter 7, Article 3 NMSA 1978 may be cited as the  
"Withholding Tax Act."**

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**7-3-2. DEFINITIONS.--As used in the Withholding Tax Act:**

A. "department" means the taxation and revenue department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

B. "employee" means either an individual domiciled within the state who performs services either within or without the state for an employer or, to the extent permitted by law, an individual domiciled outside of the state who performs services within the state for an employer;

C. "employer" means a person or an officer, agent or employee of that person having control of the payment of wages, doing business in or deriving income from sources within the state for whom an individual performs or performed any service as the employee of that person, except that if the person for whom the individual performs or performed the services does not have control over the payment of the wages for such services, "employer" means the person having control of the payment of wages;

D. "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended;

E. "payee" means an individual to whom a payor is making a pension or annuity payment;

F. "payor" means a person making payment of a pension or annuity to an individual domiciled in New Mexico;

G. "payroll period" means a period for which a payment of wages is made to an employee by the employee's employer;

H. "person" means an individual, a club, a company, a cooperative association, a corporation, an estate, a firm, a joint venture, a partnership, a receiver, a syndicate, a trust or other association, a limited liability company, a limited liability partnership or a gas, water or electric utility owned or operated by a county or municipality and, to the extent permitted by law, a federal, state or other governmental unit or subdivision or an agency, a department or an instrumentality thereof;

I. "wagerer" means any person who receives winnings that are subject to withholding;

J. "wages" means remuneration in cash or other form for services performed by an employee for an employer;

K. "winnings that are subject to withholding" means "winnings which are subject to withholding" as that term is defined in Section 3402 of the Internal Revenue Code;

L. "withholdee" means:

(1) an individual domiciled in New Mexico receiving a pension or annuity from which an amount of tax is deducted and withheld pursuant to the Withholding Tax Act;

(2) an employee; and

(3) a wagerer; and

**M. "withholder" means a payor, an employer or any person required to deduct and withhold from winnings that are subject to withholding. (Laws 2010, Chapter 53, Section 3 – Applicable to tax years beginning on or after January 1, 2011.)**

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**7-3-3. TAX WITHHELD AT SOURCE.--**

A. Every employer who deducts and withholds a portion of an employee's wages for payment of income tax under the provisions of the Internal Revenue Code shall deduct and withhold an amount for each payroll period computed from a state withholding tax table furnished by the department; provided:

(1) if the employee instructs the employer to withhold a greater amount, the employer shall deduct and withhold the greater amount;

(2) if the employee is not a resident of New Mexico and is to perform services in New Mexico for fifteen or fewer days cumulatively during the calendar year, the employer is not required to deduct and withhold an amount from that employee's wages; and

(3) if the aggregate monthly amount withheld under this section would be less than one dollar (\$1.00) for an employee, the employer shall not be required to deduct and withhold wages in regard to that employee.

B. The department shall devise and furnish a state withholding tax table based on statutes made and provided to employers required to withhold amounts under this section. This table shall be devised to provide for a yearly aggregate withholding that will approximate the state income tax liability of average taxpayers in each exemption category.

C. If an individual requests in writing that the payor deduct and withhold an amount from the amount of the pension or annuity due the individual, the payor making payment of a pension or annuity to an individual domiciled in New Mexico shall deduct and withhold the amount requested to be deducted and withheld, provided that the payor is not required to deduct and withhold any amount less than ten dollars (\$10.00) per payment. The written request shall include the payee's name, current address, taxpayer identification number and, if applicable, the contract, policy or account number to which the request applies.

D. Every person in New Mexico who is required by the provisions of the Internal Revenue Code to deduct and withhold federal tax from payment of winnings that are subject to withholding shall deduct and withhold from such payment a tax in an amount equal to six percent of the winnings, except that an Indian nation, tribe or pueblo or an agency, department, subdivision or instrumentality thereof is not required to deduct or withhold from payments made to members or spouses of members of that Indian nation, tribe or pueblo. (Laws 1996, Chapter 16, Section 4)

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**3.3.2.8 - WITHHOLDING FROM IRREGULAR WAGES**

A. Employers who make lump sum distributions, one time bonuses and other irregular payments to employees in addition to regular wages and employers required to withhold tax on fringe benefits for federal purposes shall compute the state withholding in the same manner used for computing federal withholding on these items. The employer will then use the withholding tax tables issued by the department to compute the amount of withholding tax due.

B. If an employer elects to withhold, for federal purposes, a flat percentage of the

lump-sum distribution, one-time bonus, fringe benefits and other irregular wages as provided in the Internal Revenue Code, the employer shall withhold a flat percentage for state withholding tax purposes. The flat percentage for state withholding tax purposes shall be a rate equal to the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

[9/8/86, 1/15/97, 12/15/98; 3.3.2.8 NMAC - Rn, 3 NMAC 3.2.8, 12/14/00, A, 10/31/05]

### **3.3.2.9 - TRANSPORTATION COMPANIES REQUIRED TO WITHHOLD FROM WAGES OF CERTAIN EMPLOYEES**

A. Railroads are required to withhold New Mexico withholding tax from the wages, salaries or other employee remuneration of any employee who is a resident of this state, without regard to the place of employment or amount of time which the employee performs services for the employer in this state or other states.

B. Motor carriers, private motor carriers and airlines shall withhold New Mexico income tax from the wages, salaries or other employee remuneration of any individual employee who is a resident of this state, without regard to the place of employment or amount of time which the employee performs services for the employer in this state or other states.

C. For purposes of this section (3.3.2.9 NMAC) the term "motor carrier" shall mean any person engaged in the business of transporting persons or property by motor vehicle which activity is subject to regulation by either the interstate commerce commission or the New Mexico public regulation commission. The term "private motor carrier" shall mean any person transporting persons or property by motor vehicle which activity is not subject to regulation by either the interstate commerce commission or the New Mexico public regulation commission but who is subject to the Motor Transportation Act. The term "airline" shall mean any person who provides airplane or other aircraft transportation of persons or property for consideration.

[5/24/90, 12/3/90, 1/15/97; 3.3.2.9 NMAC - Rn & A, 3 NMAC 3.2.9, 12/14/00]

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**7-3-4. DEDUCTIONS CONSIDERED TAXES.--**Amounts deducted under the provisions of the Withholding Tax Act shall be a collected tax. No employee shall have a right of action against the employer for any amount deducted and withheld from the employee's wages. No individual who has instructed a payor to deduct and withhold an amount from the pension or annuity due that individual shall have a right of action against a payor for any amount deducted and withheld pursuant to the instruction. No wagerer who receives winnings that are subject to withholding shall have a right of action against the person who deducted and withheld an amount from the wagerer's winnings for the amount deducted and withheld.

**(Laws 1996, Chapter 16, Section 5)**

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**7-3-5. WITHHOLDER LIABLE FOR AMOUNTS DEDUCTED AND WITHHELD--EXCEPTIONS.--** Every withholder shall be liable for amounts required to be deducted and withheld by the Withholding Tax Act regardless of whether the amounts were in fact deducted and withheld, except that:

A. if the withholder fails to deduct and withhold the required amounts and if the tax against which the required amounts would have been credited is paid, the withholder shall not be liable for those amounts not deducted and withheld; or

B. if the withholder's failure to deduct and withhold the required amounts was due to reasonable cause, the withholder shall not be liable for amounts not deducted and withheld.

**(Laws 2010, Chapter 53, Section 4 – Applicable to tax years beginning on or after January 1, 2011.)**

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**7-3-6. DATE PAYMENT DUE.—Taxes withheld under the provisions of the Withholding Tax Act must be paid on or before the twenty-fifth day of the month following the month when the taxes were required to be withheld. (Laws 2010, Chapter 53, Section 5 – Applicable to tax years beginning on or after January 1, 2011)**

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**7-3-7. STATEMENTS OF WITHHOLDING.--**

A. Except for employers required to file quarterly withholding information returns pursuant to the Withholding Tax Act or required to file a wage and contribution report to the workforce solutions department pursuant to Section 51-1-12 NMSA 1978, every employer shall file an annual statement of withholding for each employee. This statement shall be in a form prescribed by the department and shall be filed with the department on or before the last day of February of the year following that for which the statement is made. It shall include the total compensation paid the employee and the total amount of tax withheld for the calendar year or portion of a calendar year if the employee has worked less than a full calendar year.

B. Except for payors who file the quarterly withholding information returns pursuant to the Withholding Tax Act, every payor shall file an annual statement of withholding for each individual from whom some portion of a pension or an annuity has been deducted and withheld by that payor. This statement shall be in a form prescribed by the department and shall be filed with the department on or before the last day of February of the year following that for which the statement is made. It shall include the total amount of pension or annuity paid to the individual and the amount of tax withheld for the calendar year.

C. Every person required to deduct and withhold tax from a payment of winnings that are subject to withholding shall file an annual statement of withholding for each wagerer from whom some portion of a payment of winnings has been deducted and withheld by that person. The statement shall be in a form prescribed by the department and shall be filed with the department on or before the last day of February of the year following that for which the statement is made. It shall include the total amount of winnings paid to the individual and the amount of tax withheld for the calendar year. The department may also require any person who is required to submit an information return to the internal revenue service regarding the winnings of another person to submit copies of the return to the department.

(Laws 2010, Chapter 53, Section 6 – Applicable to tax years beginning on or after January 1, 2011)

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**7-3-8. COPY OF THE STATEMENT OF WITHHOLDING TO BE FURNISHED THE WITHHOLDEE.--**A copy of the annual statement of withholding shall be furnished to the withholdee by the withholder on or before January 31 of the year following that for which the statement is made.  
**(Laws 1990, Chapter 64, Section 6)**

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**7-3-9. WITHHELD AMOUNTS CREDITED AGAINST TAX.--**The entire amount of income upon which tax was deducted and withheld shall be included in the gross income of the withholdee for state income tax purposes. The amount of tax deducted and withheld under the provisions of the Withholding Tax Act during the taxable year shall be credited against any state income tax liability for that taxable year.  
**(Laws 1990, Chapter 64, Section 7)**

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**7-3-10. VOLUNTARY SUBMISSION TO ACT.--**Any employee whose participation under the Withholding Tax Act is not mandatory may subject himself or herself to its provisions with the consent of the employer.  
**(Laws 1990, Chapter 64, Section 8)**

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**7-3-11. ACTS TO BE PERFORMED BY AGENTS--LIABILITY OF THIRD PARTIES.--**

A. When a fiduciary, agent or other person has the control, receipts, custody or disposal of or pays the wages of an employee or group of employees employed by one or more employers and the fiduciary, agent or other person has been designated by the United States secretary of the treasury to perform such acts as required of employers for federal withholding purposes under the Internal Revenue Code, the fiduciary, agent or other person shall perform the acts required of employers by the provisions of the Withholding Tax Act. All provisions of Chapter 7 NMSA 1978 applicable in respect to an employer shall be applicable to a fiduciary, agent, or other person so designated, but the employer, unless provided otherwise by law, for whom the fiduciary, agent or other person acts shall remain subject to the provisions of Chapter 7 NMSA 1978 applicable to employers.

B. For purposes of the Withholding Tax Act, if a lender, surety or other person who is not an employer under the Withholding Tax Act with respect to an employee or group of employees, pays wages directly to the employee or group of employees employed by one or more employers or to an agent on behalf of the employee or employees, the lender, surety or other person shall be liable in its own person and estate to the state of New Mexico in sum equal to the taxes required to be deducted and withheld from those wages by the employer. Any amount paid pursuant to this subsection shall be credited against the liability of the employer.  
(Laws 1990, Chapter 64, Section 9)

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**7-3-12. INFORMATION RETURN REQUIRED FROM PASS-THROUGH  
ENTITY--WITHHOLDING.--**

A. A pass-through entity doing business in this state shall file an annual information return with the department on or before the due date of the entity's federal return for the taxable year. The information return shall be signed by the business manager or one of the owners of the pass-through entity.

B. The information return required by this section shall contain all information required by the department, including:

- (1) the pass-through entity's gross income;
- (2) the pass-through entity's net income;
- (3) the amount of each owner's share of the pass-through entity's net income; and
- (4) the name, address and tax identification number of each owner entitled to a share of net income.

C. A pass-through entity shall provide to each of its owners sufficient information to enable the owner to comply with the provisions of the Income Tax Act and the Corporate Income and Franchise Tax Act with respect to the owner's share of net income.

D. The pass-through entity shall deduct and withhold from each nonresident owner's share of net income an amount equal to the owner's share of net income multiplied by a rate set by department regulation. In the case of an owner that is an individual or entity not taxed as a corporation for federal income tax purposes for the taxable year, the rate shall not exceed the rate for composite returns. In the case of an owner that is a corporation or other entity taxed as a corporation for the taxable year, the rate shall not exceed the maximum rate for corporate income tax.

E. The provisions of Subsection D of this section shall not apply with regard to:

- (1) the share of net income of a nonresident owner that has executed an agreement in accordance with regulations or instructions of the department that the owner will report and pay tax, if required, on its own return pursuant to the Income Tax Act or the Corporate Income and Franchise Tax Act;
- (2) oil and gas proceeds subject to the Oil and Gas Proceeds Withholding Tax Act; or
- (3) a publicly traded partnership as defined in Subsection (b) of Section 7704 of the Internal Revenue Code, as may be amended or renumbered, and that is not treated as a corporation pursuant to that section.

F. Amounts deducted from the owner's share of net income under the provisions of this section shall be a collected tax. No owner shall have a right

**of action against the pass-through entity for any amount deducted and withheld from the owner's share of net income.**  
**(Laws 2005, Chapter 185, Section 1)**

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### **3.3.2.10 - WITHHOLDING BY PASS-THROUGH ENTITIES**

A. **Withholding by pass-through entities; rate.** For periods beginning on or after January 1, 2004 and ending prior to January 1, 2011, the rate of withholding by pass-through entities pursuant to the provisions of Subsection D of Section 7-3-12 NMSA 1978 shall equal the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

B. **Withholding by pass-through entities; agreements; reasonable cause.** The obligation to collect and remit withholding amounts pursuant to Subsection D of Section 7-3-12 NMSA 1978 may be avoided if the nonresident owner submits to the pass-through entity an agreement authorized by Subsection E of that section in the form and manner prescribed by the secretary. An agreement may be restricted to a single taxable year, may cover multiple years or may be put into effect for an indefinite term subject to revocation by the nonresident owner. An agreement must be in the possession of the pass-through entity at the time the pass-through entity files its return for the taxable year to which the agreement pertains. When a nonresident owner becomes a resident of New Mexico, the agreement submitted by that owner is revoked automatically, effective for the taxable year in which the change in residence took place. The obligation to withhold may also be avoided if the pass-through entity demonstrates that failure to withhold is due to a reasonable cause pursuant to Subsection B of Section 7-3-5 NMSA 1978.

C. **Due date exception.** The due date specified in Section 7-3-6 NMSA 1978 does not apply to payment of amounts withheld in accordance with Section 7-3-12 NMSA 1978. The due date specified in Section 7-3-12 NMSA 1978 with respect to such amounts controls.

D. **Crediting to tax year.** Amounts withheld pursuant to the provisions of Section 7-3-12 NMSA 1978 with respect to an owner shall be credited to the owner for the same taxable year for which the income is required to be reported for federal income tax purposes.

E. Withholding by pass-through entities for periods beginning on or after January 1, 2011 is governed by the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act and 3.3.5 NMAC. 3.3.2.10 NMAC does not apply to such withholding by pass-through entities after December 31, 2010 except as provided in Subsection E of 3.3.5.16 NMAC.

[12/31/99; 3.3.2.10 NMAC - Rn & A, 3 NMAC 3.2.10, 12/14/00, A, 10/31/05; A, 12/15/10]

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**7-3-13. WITHHOLDING INFORMATION RETURN REQUIRED--  
PENALTY.--**

**A. An employer that has more than fifty employees and is not required to file an unemployment insurance tax form with the workforce solutions department or a payor shall file quarterly a withholding information return with the department on or before the last day of the month following the close of the calendar quarter.**

**B. The quarterly withholding information return required by this section shall contain all information required by the department, including:**

- (1) each employee's or payee's social security number;**
- (2) each employee's or payee's name;**
- (3) each employee's or payee's gross wages, pensions or annuity payments;**
- (4) each employee's or payee's state income tax withheld; and**
- (5) the workers' compensation fees due on behalf of each employee or payee.**

**C. Each quarterly withholding information return shall be filed with the department using a department-approved electronic medium.**

**D. Any employer or payor required to file the quarterly withholding information return who fails to do so by the due date or to file the return in accordance with Subsection C of this section is subject to a penalty in the amount of fifty dollars (\$50.00).**

**(Laws 2010, Chapter 53, Section 7 - Applicable to tax years beginning on or after January 1, 2011.)**

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